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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 755

HERMAN HOFFMAN AND NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION,

Appellants,

vs.

WILLIAM P. O'BRIEN, AS POLICE COMMISSIONER OF THE CITY OF NEW YORK; FRANK HOGAN, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, STATE OF NEW YORK, AND NATHANIEL L. GOLDSTEIN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE POLICE COMMISSIONER OF THE CITY OF NEW YORK AND THE DISTRICT ATTORNEY FOR THE COUNTY OF NEW YORK TO DISMISS OR AFFIRM.

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Counsel for William P. O'Brien,
Police Commissioner of the City of New York;
FRANK S. HOGAN,
District Attorney, New York County,
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SEYMOUR B. QUEL,
ROBERT E. HUGH,
Assistant Corporation Counsels;
WHITMAN KNAPP,
EDWIN C. HOYT, JR.,
Asistant District Attorneys,
Of Counsel.

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No. 755

HERMAN HOFFMAN AND NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION,
Appellants,

vs.

WILLIAM P. O'BRIEN, AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, A MUNICIPAL CORPORATION; FRANK HOGAN, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK, STATE OF NEW YORK, AND NATHANIEL L. GOLDSTEIN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Now come appellees, the Police Commissioner of the City of New York, and the District Attorney of the County of New York, and move that the appeal be dismissed, or in the alternative that the final order appealed from be affirmed.

Preliminary Statement

This is an appeal pursuant to the provisions of Section 1253 of the United States Code (28 U. S. C. A. § 1253) from

an order of the United States District Court for the Southern District of New York (*L. Hand*, Circuit Judge; *Conger* and *Ryan*, District Judges) dismissing the complaint for lack of jurisdiction. The opinion (per *Ryan*, District Judge) has not yet been officially published.

Introduction

Plaintiffs, basing their claim on Section 605 of the Federal Communications Act, sought a judgment declaring invalid Article I, Section 12, of the Constitution of the State of New York and Section 813-a of the New York Code of Criminal Procedure (judicially supervised interception of telephone and telegraph communications for detection of crime). Plaintiffs also asked for a permanent injunction restraining, among other things, the further issuance of any telephone or telegraph interception orders by judicial officers of the State of New York.

The above-mentioned constitutional and statutory provisions of the State of New York authorize the use of telephone and telegraph interceptions by State law enforcement officers under a system of judicial supervision through the issuance of warrants or *ex parte* orders (New York Constitution, Art. I, Sec. 12; New York Code Crim. Proc. § 813-a). Applications for interception orders may be made only by the attorney general, a district attorney, or a police officer above the rank of sergeant, and must be based on the officer's oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained (New York Code Crim. Proc. § 813-a; New York Constitution, Art. I, Sec. 12). The officer must apply to a judge of the Court of General Sessions, a County Court, or the New York Supreme Court (New York Code Crim. Proc. § 813-a). In the case of telephones, the actual telephone line to be intercepted, the person or persons using it, and the purpose of the interception, must be particularly described (New

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York Code Crim. Proc. § 813-a). The judge may examine the officer, or other witnesses, under oath, and shall issue the order only if satisfied that there is reasonable ground for belief that evidence of crime can be obtained (New York Code Crim. Proc. § 813-a).

Carefully avoiding any allegation that their own telephone lines were subject to a crime-detection court order, plaintiffs sought relief upon allegations that interception orders obtained by defendants affected many public telephones in the City and State of New York widely used by its resident, and resulted in "an endless chain of interceptions and divulgences" touching "communications of many citizens • • • including the plaintiffs" (Complaint, paragraphs 8 and 9).

Point I

The Court Below Properly Dismissed the Complaint for Lack of Jurisdiction

A. *No Actual Controversy Was Presented*

This Court has frequently ruled that a complaint of this nature does not present an actual controversy for judicial determination (*Stearns* v. *Wood*, 236 U. S. 75; *Frothingham* v. *Mellon*, 262 U. S. 447; *Massachusetts State Grange* v. *Benton*, 272 U. S. 525; *Williams* v. *Riley*, 280 U. S. 78; *United Public Workers* v. *Mitchell*, 330 U. S. 75).

In *United Public Workers* v. *Mitchell*, 330 U. S. 75, certain employees of the federal government sought to enjoin enforcement of an act which prohibited their participation in political management or political campaigns. With one exception, each plaintiff alleged that, solely out of fear of dismissal pursuant to the act, he had been deterred from exercising his political rights. Nevertheless, the Court held that these plaintiffs' general interest in their claimed

privilege of engaging in political activities was not sufficient to give them a right to sue. It ruled that only the one plaintiff who had violated the act, and was being proceeded against for removal, was entitled to have the District Court consider the constitutional question.

Massachusetts State Grange v. *Benton*, 272 U. S. 525, was an attempt by diverse parties to enjoin enforcement of a state daylight saving law. One plaintiff alleged pecuniary loss as well as worry occasioned by the need of adjustment to two standards. Another alleged loss of sleep. The Court found each plaintiff's personal interest insufficient, and refused to exercise jurisdiction.

In *Stearns* v. *Wood*, 236 U. S. 75, a national guard major sought to enjoin enforcement of War Department orders which would limit the rank of officers in his department to lieutenant colonel and would thus prevent him from attaining the higher ranks permitted by state law. The court found that this plaintiff, whose present rank was undisturbed, had shown no personal interest that entitled him to have the District Court consider the validity of the orders.

In *Frothingham* v. *Mellon*, 262 U. S. 447, a federal taxpayer sued to enjoin grants to a state under a federal law which she thought unconstitutional, and which, she alleged, caused her pecuniary loss by increasing her tax burden. Her bill was dismissed because the claimed injury was not personal to her but was suffered only "in common with people generally" (262 U. S., at p. 488).

In *Williams* v. *Riley*, 280 U. S. 78, motorists sought to enjoin collection of a state gasoline tax which they viewed as a highway toll forbidden by Congress. The Court found that plaintiffs lacked the kind of interest that would entitle them to question the tax.

Similarly, in the instant case, the allegation that "communications of many citizens • • • including the plain-

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tiffs" were affected by the alleged interceptions contained nothing that distinguished plaintiffs' situation from that of the general public (Complaint, paragraphs 8 and 9). Accordingly, plaintiffs were without standing to question the validity of the New York laws.

B. *The Complaint Failed to Show That the Plaintiffs Had Been Deprived of Any Civil Right*

Even if an actual controversy had existed, the District Court would still have lacked jurisdiction. In the absence of diversity of citizenship or any allegations as to jurisdictional amount, plaintiffs base their claim of jurisdiction upon the contention that wiretapping under the New York law deprived them of rights secured by the Constitution of the United States or by an act of Congress providing for equal rights of citizens [28 U. S. C. A. § 1343 (3); 8 U. S. C. A. § 43; Plaintiffs' jurisdictional statement, pp. 4-5]. This contention is baseless.

Wiretapping *per se* is not a violation of any clause of the Constitution (*Olmstead* v. *United States*, 277 U. S. 438, 464-466; *Goldman* v. *United States*, 316 U. S. 129, 135-136). Moreover, since plaintiffs' principal allegation is that their communications were being intercepted together with those of citizens and residents of New York City in general, it is apparent that they have not alleged that they or any class to which they belong have been singled out for purposeful discrimination so as to deprive them of the equal protection of the laws (*Kotch* v. *Board of River Pilot Commissioners*, 330 U. S. 552, 556-557; see also *Magoun* v. *Illinois Trust and Svaings Bank*, 170 U. S. 283, 293; *Snowden* v. *Hughes*, 321 U. S. 1, 8-10).

Finally, Section 605 of the Federal Communications Act—the substantive statute upon which plaintiffs rely—is not an act "providing for equal rights of citizens" within the meaning of the provisions of the Judicial Code and the Civil

Rights Act which the plaintiffs invoke (28 U. S. C. A. § 1343; 8 U. S. C. A. § 43). The jurisdiction conferred upon the District Court by those sections extends only to the protection of those civil rights secured by the Constitution (see *Holt* v. *Indiana Manufacturing Company*, 176 U. S. 68, 72; also Mr. Justice Stone, concurring, in *Hague* v. *C. I. O.*, 307 U. S. 496, 525-532).

Conclusion

The complaint presented no controversy within the jurisdiction of the District Court. The appeal should therefore be dismissed, or in the alternative the order appealed from should be affirmed.

Respectfully submitted,

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February, 1950.

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